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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Preston W. Small,
Petitioner,

v.

Federal Communications Commission
and United States of America,
Respondents.

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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August 30, 2005

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals has jurisdiction to review the entire record before the Federal Communications Commission in upholding the FCC's denial of Mr. Small's application in a 47 U.S.C. § 307(b) comparative licensing proceeding.

2. Whether the court of appeals erred by failing to review the FCC's exclusion of record facts and arguments including the exclusion of the Hartsfield Jackson Atlanta International Airport, owned by the City of Atlanta, but located in College Park, GA, from an analysis of "mutual economic reliance."

3. Whether the court of appeals correctly entered findings of fact and conclusions of law which do not appear in the FCC's orders, or the record, in upholding the agency's decision.

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner, Preston W. Small, an individual.

2. Respondents, Federal Communications Commission and the United States of America.

3. Intervenor below: WNNX LICO, Inc., a subsidiary of Susquehanna Radio Corporation, which in turn is a subsidiary of Susquehanna Pfaltzgraph Co.

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2. *Report and Order* (*First Staff Order*), 15 FCC Rcd. 9971 (Alloc. Br. 2000), DA 00-322, (65 FR 31498, May 18, 2000), *Erratum*, May 2, 2000.....App. 8a.

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V. OPINIONS AND ORDERS BELOW

1. *Judgment*, United States Court of Appeals for the District of Columbia Circuit, Nos. 04-1056 & 04-1057, May 19, 2005, unpublished, App. 1a; panel rehearing denied, June 8, 2005, App. 4a; rehearing en banc denied, July 26, 2005. App. 6a.

2. *Report and Order* (*First Staff Order*), 15 FCC Rcd. 9971 (Alloc. Br. 2000), DA 00-322, (65 FR 31498, May 18, 2000), *Erratum*, May 2, 2000. App. 8a.

3. *Memorandum Opinion and Order* (*Second Staff Order*), 16 FCC Rcd. 3411 (Alloc. Br. 2001), DA 01-333, (66 FR 14862, March 14, 2001). App. 21a.

4. *Memorandum Opinion and Order* (*First Order on Review*), 16 FCC Rcd. 19857, FCC 01-324, released November 8, 2001 (no *Federal Register* publication). App. 30a.

5. *Memorandum Opinion and Order* (*Second Order on Review*), 17 FCC Rcd. 14830, FCC 02-201, released July 25, 2002 (67 FR 55729, August 30, 2002). App. 33a.

6. *Memorandum Opinion and Order* (*Third Order on Review*), 19 FCC Rcd. 1603 (FCC 2004), FCC 04-1, released January 22, 2004, (69 FR 6582, February 11, 2004). App. 36a.

VI. JURISDICTIONAL STATEMENT

The FCC's jurisdiction to act is found at 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), 303(r), and 307(b). *First Staff Order*, ¶ 13; App. 17a.

Jurisdiction in the court of appeals pertained under 47 U.S.C. § 402(b) because the final rulemaking orders granted WNNX's license modification request and denied Mr. Small's license modification request. *See Judgment*, at 2; App. 2a

(holding is made in No. 04-1056 § 402(b) appeal). Mr. Small also sought review under 47 U.S.C. § 402(a) in No. 04-1057. Appellate jurisdiction also pertains under 5 U.S.C. § 702 which authorizes appellate review of final agency action.

The court of appeals, on its own motion, raised questions concerning the timing of Mr. Small's appeal to that court given Mr. Small's second reconsideration petition filed with the FCC Commissioners. Mr. Small generally responded that multiple reconsideration petitions are routinely filed at the FCC and that the appeals court routinely hears cases from the FCC involving multiple reconsideration petitions. Moreover, Mr. Small cited *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) for the proposition that the appellate filing clock restarts for an entire matter when a subsequent order "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered" amounting to more than textual correction. The *Second Order on Review* contained new substantive material compared to the *First Order on Review* thereby restarting the appellate filing period. The *Judgment* does not discuss this issue and does not fault Mr. Small's manner of exhausting remedies.

The United States Court of Appeals for the District of Columbia Circuit filed its *Judgment* in this case on May 19, 2001. Mr. Small timely filed petitions for rehearing and rehearing en banc, on May 26, 2005, and June 27, 2005, each date being within 45 days of May 19, 2005, as required by D.C. Circuit Rule 35(a), which petitions were denied on June 8, 2005, and July 26, 2005, respectively.

Subject matter jurisdiction arises in this Court under 5 U.S.C. § 702, 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j). Pursuant to Supreme Court Rules 13.1 and 13.3, and the Court's decision in *Hibbs v. Arizona Department of Revenue*, 124 S. Ct. 2276, 2283-84 (2004), the instant petition is timely because it is being filed within 90 days of the issuance of the July 26, 2005 *en banc* rehearing denial order and, if relevant,

within 90 days of the June 8, 2005, panel rehearing denial order.

Standing is established where 1) the FCC's denial of Mr. Small's license application 2) caused a denial of a Federal benefit to Mr. Small, a modified radio station license, and denied Mr. Small the opportunity to increase the value of his station by an estimated $20-$40 million, and 3) reversal of the FCC's denial orders would remedy the injuries. *See generally, Lujan v. Defenders of Wildlife*, 504 US 555, 560-61 (1992).

VII. STATUTORY AND REGULATORY PROVISIONS CITED

5 U.S.C. §§ 701(a)(1), 701(a)(2), 702, 706, 706(2)(A); 28 U.S.C. § 1254(1); 47 U.S.C. §§ 154(i), 155(c)(1), 214(c), 303(g), 303(r), 307(b), § 310(d), 402(a), 402(b), 402(j); 47 C.F.R. § 1.1210. *See Statutory Appendix.*

VIII. STATEMENT OF THE CASE

In 1996 Mr. Small attempted to sell his Milledgeville, GA FM radio station to Scotts Trail Radio, Inc. and consented to the filing of a petition to relocate his station to Covington, GA. The sale did not close, however, because WNNX LICO, Inc. objected to the FCC and asserted a contractual right against Mr. Small, and Mr. Small soon adopted Scotts Trail Radio, Inc.'s application and filed a similar application of his own. Thereafter WNNX filed a mutually exclusive petition to relocate its Anniston, AL FM station to the Atlanta Urbanized Area and dismissed its then pending application for review seeking reversal of the FCC's denial of WNNX's earlier request to relocate that station to the Atlanta urbanized area. Mr. Small had also filed first in that earlier proceeding, but dismissed his application pursuant to a settlement agreement which agreement served as the basis of WNNX's protest noted above. Mr. Small counter proposed Social Circle, GA as his city of license. Each filer claimed a dispositive "first local service" preference. *First Staff Order*, ¶¶ 5, 11; App. 11a, 16a. Mr. Small argued that WNNX was not entitled to a first local preference credit because WNNX's proposed city of license,

College Park, GA, is located in the Atlanta Urbanized Area and the FCC's licensing rules required that the approximately 40 or so Atlanta area radio stations be attributed to College Park leaving Mr. Small with a dispositive first local service preference.

In fulfilling its mandate under 47 U.S.C. § 307(b) to distribute licenses the FCC reviews mutually exclusive proposals pursuant to a Priority List: 1) first fulltime aural service; 2) second fulltime aural service; 3) first local service; and 4) other public interest considerations such as population gains/losses, reception interference, etc. Co-equal weight are given to Priorities 2 and 3. *First Staff Order*, ¶ 5 & n. 1; App. 11a; *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). First local service is dispositive. *First Staff Order*, ¶¶ 12, 17; App. 12a, 17a.

> The *First Staff Order*, ¶ 7; App. 12a-13a, provides that we will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallot its channel to a suburban community in or near an Urbanized Area. . . . *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *RKO General, Inc. (KFRC)*, 5 FCC Rcd. 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd. 5374 (1988). . . . [W]e consider the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most importantly, the independence of the suburban community.

The FCC regulates station migration to a larger Urbanized Areas by deciding whether a community "in or near an Urbanized Area" is deserving of a "first local service preference." *First Staff Order*, ¶ 7; App. ___; *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7099 ¶ 13 (FCC 1990), *Tuck*, 3 FCC Rcd. 5374, 5378 ¶ 36 (FCC 1988). *Tuck*, 3 FCC Rcd. 5374 ¶ 5 explains that "the application of the so-called *Huntington* doctrine [ ] precludes the grant of such dispositive

[307(b)] preferences in certain circumstances," *Tuck*, 3 FCC Rcd. 5374 ¶ 1, and gives "guidance on the *Huntington* issue" because the D.C. Circuit "observed that 'the FCC's policy of assigning licenses to communities in metropolitan areas once again appears to be in a state of confusion.'" *Tuck*, 3 FCC Rcd. at 5375-76 ¶ 16 citing *New Radio Corp. v. FCC*, 804 F.2d 756, 762 (D.C. Cir. 1987). The FCC determined that "the ultimate focus of our analysis in these cases is the characteristics of the specified community rather than the technical aspects of the applicant's proposal." The interdependence between the specified city and the central city is "the most important consideration under *Huntington*" while "the size and proximity of the specified community to the central city, and signal population coverage -- is pertinent but has less significance." *Tuck*, 3 FCC Rcd. at 5377 ¶ 28.

Tuck provides a sampler of "characteristics most likely to reflect such interdependence," however, the FCC plainly stated that "we emphasize that our list is not exhaustive, and that there is no set of indicia of interdependence that must be shown in order to invoke the *Huntington* exception." *Tuck*, 3 FCC Rcd. at 5378 ¶ 35. The FCC is "particularly interested in evidence showing a commonality of interest based on mutual economic reliance between the specified community and the larger metropolitan area," *Tuck*, 3 FCC Rcd. at 5378 ¶ 37, and the FCC specifically determined that "joint production of local public goods" would indicate mutual economic reliance. *Tuck*, 3 FCC Rcd. at 5378 ¶ 37.

WNNX's competing transmitter is proposed to be located in the Atlanta Urbanized Area and within the City of Atlanta itself. The FCC did not discuss that WNNX proposed primary service to all of the Atlanta Urbanized Area and principal service to Atlanta. The FCC did not discuss WNNX's first Atlanta relocation attempt which proposed substantially the same transmission facilities and did not address whether WNNX's College Park proposal is merely a

prohibited technical manipulation of the allocation rules to try to achieve something that has already been denied.

The FCC also did not discuss a multitude of facts relating to the *interrelationship between College Park and* Atlanta including, 1) Atlanta ownership of 60%+ of College Park's land area to operate the world's busiest airport; 2) WNNX's admission that the Airport's impact on College Park is "definite," "profound," and "devastating;" 3) WNNX's admission that "Hartsfield International Airport" is a "major employer located in the community which employs primarily College Park residents;" 4) WNNX's admission that "a large number of workers (40%) actually commute from Atlanta and other nearby communities to College Park!" (parenthetical/punctuation in original); 5) WNNX's admission that a "most visible sign[] of College Park's economic independence [is] the Hartsfield Airport;" 6) WNNX's admission that "College Park is a Major Transportation Hub;" 7) WNNX's admission that "the Airport is subject to the City's taxing authority and is therefore a major source of revenue to College Park;" 8) WNNX's admission that there is "a large network of hotels and motels has developed in College Park to support both the Airport and the Convention Center;" 9) WNNX's admission that the Atlanta Airport "largest employment district in the State" and the "largest economic generator in the Southeast." WNNX's November 1997 *Petition for Rulemaking*, including Exhibit 1, refer to the Airport no less than 40 times while Exhibit 1 alone refers to Atlanta no less than 59 times. *See generally* No. 04-1056, *Small Brief*, at 32; No. 04-1056, *Small Reply*, at 18-19; No. 04-1056, *Small Petition for Rehearing En Banc*, at 3; No. 04-1056, JA0097, 0106, 0139-41, 0370-0371. The *Judgment* does not examine these this evidence of "mutual economic reliance" and does not explain why the FCC could properly exclude it from the *Tuck* analysis.

The "evidence" of mutual economic reliance which the FCC did consider, and which the *Judgment* finds sufficient, was that College Park has a local cable access channel, a web site, a recreation park newsletter, that local people perceived College Park as an "independent" community, that College Park has elected officials, that College Park has its own telephone directory, that College Park has its own zip code, that College Park contains business establishments, that a minority (16%) of College Park's residents work in College Park, that College Park provides police and fire services, and that College Park has building and plumbing codes. *Second Staff Order*, ¶¶ 7-8; App. 12a-14a; *First Order on Review*, ¶ 2. App. 31a-32a. Neither the FCC nor the *Judgment* address how possession of these attributes demonstrate a lack of interrelationship between College Park and the Atlanta Urbanized Area or explain why possession of any or all of these attributes precludes significant interrelationship on other levels. There is no discussion about how these factors are weighed against Atlanta's ownership and operation of the huge international airport situated within College Park.

Mr. Small was sued by a party seeking to force Mr. Small's withdrawal alleging that 1) WNNX's College Park proposal was substantially similar to WNNX's previously denied Sandy Springs relocation plan and 2) that if WNNX prevailed the party would receive a $10-$20 million payment. The FCC did not discuss that WNNX considers its two Atlanta Urbanized Area licensing proposals to be substantially similar thereby implicating allocation manipulation.

WNNX asserted *ex parte* that Mr. Small's exhaustion efforts were a "unique abuse" of procedure. The FCC denied Mr. Small's *ex parte* complaint because Mr. Small was able to respond. Neither the FCC nor the *Judgment* discusses why an *ex parte* violation evaporates when the victim discovers the *ex parte* communication by chance

Two U.S. Senators interceded for six FM radio stations to support rural allocations in Alabama and urged the FCC to

issue a final order relocating WNNX's station out of Anniston so that six Alabama radio stations could improve. The FCC's General Counsel's Office found these presentations impermissible *ex parte* stating a concern for the "appearance of fairness," but the Commissioners refused to investigate whether WNNX prompted the intervention and the *Judgment* does not discuss the issue. The FCC ignored facts and argument that: 1) WNNX's counsel is counsel in the FCC's files for each of the six radio stations; 2) WNNX's law firm contributes financially to one of the Senators; 3) the Senators' letters were substantially the same evidencing the same source; 4) that the Senators served Mr. Small, but not WNNX, suggesting that WNNX already had the letters, and 5) it strains credulity to believe that six stations, represented by the same lawyer, acted independently, at the same time, to contact the same representatives with substantially the same text. Attempting to corrupt a restricted proceeding is fatal, *see e.g.*, 47 C.F.R. § 1.1210 ("no person shall solicit or encourage others to make any improper presentation"); *Schoenbohm v. FCC*, 204 F.3d 243, 248 (D.C. Cir. 2000); *Stearns County Broadcasting Company, Inc.*, 104 F.C.C.2d 688, 698-99 ¶¶ 12-13 (Rev. Bd. 1986), but no effort was made to determine who procured the Senators -- the issue is not whether the improper contacts were effective, but who is responsible.[1]

As a send off the *Third Order on Review* n. 9, compares Mr. Small to the litigant in *In re: Anthony R. Martin-Trigona*, 592 F.Supp. 1566 (Dist. CT 1984). The Second Circuit determined that Martin-Trigona filed over 250 civil actions, "maintained an incessant stream of frivolous or meritless motions, demands, letters . . . as well as vexatious law suits against bankruptcy judges, trustees, attorneys and their families and associates;" "used legal pleadings to ventilate his contempt

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[1] The Senators, of course, are excused because they service constituent requests and rely upon candid disclosures.

and hatred of persons of Jewish heritage and to level accusations which 'have often been personal, have often emphasized racial or religious affiliations, and have often involved the members of judges' and counsel's families;" used the legal process "to launch vicious attacks upon persons of Jewish heritage;" "was denied admission to the Illinois bar because 'he lacks the qualities of responsibility, candor, fairness, self-restraint, objectivity and respect for the judicial system which are necessary adjuncts to the orderly administration of justice;'" he apparently served time for contempt. *In re: Anthony R. Martin-Trigona*, 737 F.2d 1254, 1256, 1257 n. 1, 1259 (2nd Cir. 1984). The *Judgment* does not address the FCC's improper comparison.

IX. ARGUMENT

A. Standard of Review

5 U.S.C. § 706 requires judicial examination of the "whole record" and those portions cited by a party to determine whether the FCC's decision was based upon relevant data, whether the FCC failed to consider important information, and whether the FCC properly applied licensing standards to determine whether the FCC's action is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *see generally, FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978) (FCC decisions in broadcast rulemaking cases receive "searching and careful" review to ensure the decision is "rational and based on consideration of the relevant factors"). With all respect, the Court of Appeals did not follow the statutory requirement to examine the portions of the record which conflicted with the FCC's ultimate decision. The *Judgment*, at 2; App. 2a., merely states that there is a record which "supports the Commission's decision." However, the issue is not whether there is some evidence supporting the FCC's decision because that is not the review standard used in informal rulemaking cases. The proper inquiry is whether the FCC examined the relevant factors, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 803, and made a "rational connection between the

facts found and the choice made." *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10th Cir. 1983).

B. The FCC's Licensing Rules

The FCC selects between competing license modification applicants pursuant to numerous legal standards including 47 U.S.C. § 307(b); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *New Radio Corp. v. FCC*, 804 F.2d 756 (D.C. Cir. 1987); *RKO General, Inc. (KFRC)*, 5 FCC Rcd. 3222 (FCC 1990); *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094 ¶ 11 (FCC 1990) ("we believe it is axiomatic that our allotment priorities and policies are and should be applied consistent with and in furtherance of the goals of Section 307(b) of the Act"); *Faye and Richard Tuck*, 3 FCC Rcd. 5374, 5376 ¶ 19 (FCC 1988) (explaining that "Section 307(b) requires the Commission to 'make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service'" and establishing urbanized area allotment procedures); *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (FCC 1982) (establishing FM allotment priorities). *See also Florida Institute of Technology v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992) ("the FCC must afford a comparative hearing to mutually exclusive applicants for a broadcast license and "ensure consistent and impartial treatment of applicants") citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). These allocation rules cannot be ignored because "it is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned." *Reuters Limited v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

C. Probative Evidence of Mutual Economic Reliance Was Ignored

There is a huge international airport located in College Park, GA, a community of approximately 20,000 people at the time the record in this proceeding closed, which is owned and

operated by the City of Atlanta. Millions of people travel to and from that airport each year, though a substantial majority of them likely operate under the impression that they are landing in Atlanta because of the "Welcome to Atlanta" signs posted by the "Mayor of Atlanta" which are located at the Airport. *Second Staff Order*, n. 4; App. 28a. WNNX conceded in pleadings at the FCC that the Airport has an enormous impact on the lives of the people in College Park. However, the *Judgment* does not examine the FCC's failure to address, in the context of an analysis designed to determine the "mutual economic reliance" between two communities, the fact that the City of Atlanta owns 60+% of WNNX's proposed license city to operate the world's busiest airport. In a very real sense College Park is an extension of the Central City of Atlanta and the Airport is plainly significant to any interrelationship analysis given, *inter alia*, WNNX's concession that the Airport generates substantial tax revenue for College Park, given Atlanta's right to three times as much of the tax revenue generated by the Atlanta Airport as College Park even though the Airport is located in College Park, given WNNX's concession that the Airport is a substantial employer of College Park residents, given the tourist money provided to College Park and generated by the Airport, given the huge impact created by businesses adjunct to the Airport such as hotels, transportation, food services, construction, and freight shipping, and given that Atlanta cont. ues to acquire portions of College Park for airport expansion such that, as WNNX admitted, College Park must battle Atlanta for its continued existence.

The *Judgment* fails to examine the facts that 1) WNNX's proposed transmitter is located in the middle of the City of Atlanta, though licensed to College Park, 2) WNNX's proposal completely covers the City of Atlanta with a city grade signal, and 3) the FCC previously rejected WNNX's substantially similar proposal which denial became final *after* WNNX filed to compete against Mr. Small's license proposal

in the instant proceeding. *See Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580 (Mass Med. Bur. 1991), 56 Fed. Reg. 56490 (November 5, 1991), *app. for rev. dism'd*, 12 FCC Rcd. 8392 (1997), *app. for rev. dism'd*, 13 FCC Rcd. 2104 (1998). The FCC's rule is that it will not permit a technical manipulation of its rules to permit a relocation into an urbanized area, *RKO General, Inc. (KFRC)*, 5 FCC Rcd. 3222, 3223 ¶ 11 (FCC 1990) (proposals having substantially similar urban coverages, but where one seeks a § 307(b) first local service preference by proposing service to another community "might appear to condone an artificial and unwarranted manipulation of the Commission's policies"), yet the *Judgment* does not discuss this issue. The *Judgment* also fails to examine, *inter alia*, 1) that a sliding scale is used to examine interdependence evidence in *Tuck* cases such that the closer the license city is to the Central City, the less evidence of interdependence which is required; *Tuck*, 3 FCC Rcd. at 5378 ¶ 34; 2) the FCC's failure to assign weight to the evidence; and 3) whether possession of various *Tuck* factors, such as the existence of local government, a zip code, a plumbing code, or a phone book, even addresses interdependence.

Instantly the relevant factors are examined to determine whether the FCC's denial of Mr. Small's license application comports with the manner of awarding radio station licenses prescribed by law. Despite the fact that *Tuck* does not provide an inflexible listing of factors used to determine mutual economic reliance, but rather seeks interrelationship evidence without limitation, the *Judgment*, at 2; App. 2a., upholds the FCC by finding that "the first local service priority is evaluated based on eight factors outlined by the FCC" in *Tuck*. The *Judgment* applies a licensing standard which simply does not exist.

D. The FCC La ks "Discretion" to Ignore Probative Evidence in Selecting Licensees

The *Judgment*, at 2; App. 2a., justifies the failure to address the "whole record" by asserting, without any support whatsoever, that the FCC's act of selecting between competing radio license applicants is a matter "within its discretion." This determination is completely untenable. The critical importance of the word "discretion" to the *Judgment* is demonstrated by removing the word "discretion" from the pertinent sentence in the *Judgment*, upon doing so one is left with a circular explanation that the FCC acted properly because it acted. However, one does not "lightly" conclude that a matter is "committed to agency discretion" because "the APA embodies a basic presumption of judicial review" and the category of matters which is "committed to agency discretion by law" is a "very narrow one, reserved for those rare instances where statues are drawn in such broad terms that in a given case there is no law to apply." *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 788 (D.C. Cir. 2000) (internal quotes omitted) citing *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). There is a "'strong presumption' of reviewability" under the Communications Act. *Comcast Corporation v. FCC*, 114 F.3d 223, 226 (D.C. Cir. 1997).[2] *See also Heckler v. Chaney*, 470 U.S. 821, 826 (1985) ("general presumption that all agency decisions are reviewable under the APA" and exceptions to reviewability are narrowly construed); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (Congress intends the APA

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[2] The D.C. Circuit has determined that the "public interest" requirement found at 47 U.S.C. § 310(d) and that 47 U.S.C. § 214(c)'s authorization to the FCC to impose conditions "in its judgement" provide sufficiently precise standards to permit judicial review. *See e.g., GTE Service Corporation v. FCC*, 782 F.2d 263, 268 n. 5 (D.C. Cir. 1986).

to "cover a broad spectrum of administrative actions."). This Court long ago determined that the public interest, convenience, and necessity standard in the Communications Act "is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *NBC v. United States*, 319 U.S. 190. 216 (1943). Nevertheless, the *Judgment* concludes that the FCC's selection between competing applicants is a matter of "discretion" and effectively overturns sixty years of licensing case law without a word of explanation.[3]

Selection between competing license applicants is not an area which Congress has committed to FCC discretion either by precluding judicial review by statute, 5 U.S.C. § 701(a)(1), or by committing to agency discretion by law. 5 U.S.C. § 701(a)(2). There is nothing in the text of the Communications Act which provides that the FCC has "discretion" to select between licensees or to ignore evidence in a licensing proceeding. Moreover, no such discretion is imputed by the law. As discussed above, the FCC's ability to select between competing license modification applicants is limited by numerous legal standards which date back to at least *NBC v. United States*, 319 U.S. 190. 216 (1943) and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), if not earlier. Because there are judicially manageable standards the matter is not committed to agency discretion by law. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The FCC's licensing orders must be "rational and based on consideration of the relevant factors," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978), and the FCC and a reviewing court are required to weigh "substantial evidence considering the whole record . . . pro and con . . .." *FCC v. Allentown Broadcasting Corp*, 349 U.S. 358, 362-64 (1955)

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[3] The D.C. Circuit's unpublished *Judgment* is precedential. D.C. Cir. Rule 28(c)(1)(B).

(this Court agrees with the FCC's decision awarding a license to the much smaller community and vacated the appellate decision and remanded). The FCC's and WNNX's appellate briefs concede that the FCC does not have "discretion" in this licensing case to ignore evidence when they argue that the case is analyzed under 5 U.S.C. § 706 which requires examination of the "whole record." *FCC Brief*, at 19; *WNNX Brief*, at 4 (deferring to the standard of review under 5 U.S.C. § 706(2)(A) discussed in the *FCC Brief*). The FCC's view that the Communications Act does not provide it with discretion to ignore evidence in selecting a licensee is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Atlanta Airport is the elephant in the parlor and the FCC does not have discretion to ignore it.

E. The D.C. Circuit's § 307(b) Analysis Conflicts With the 10th Circuit's § 307(b) Analysis

The 10th Circuit's decision in *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10th Cir. 1983), cogently explains how FCC § 307(b) decisions are reviewed. In that case the 10th Circuit upheld the FCC after determining that the FCC had given a "'hard look' at the record" and that a "fair hearing was given to all interested in the proceedings." *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d at 624. The 10th Circuit found that the "FCC has thoroughly explored, and carefully analyzed the pertinent facts. It 'has been diligent to take a hard look at the problem areas, and to set forth with clarity grounds of reasoned decision.'" *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d at 626 citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852-53, *cert. denied*, 403 U.S. 923 (1971). *See* Supreme Court Rule 10(a).

Instantly the FCC and the *Judgment* completely fail to explain why, *inter alia*, the Atlanta Airport is not a factor to be considered in examining the"mutual economic reliance" between College Park and Atlanta. Obviously the largest economic engine in the southeast is entitled to consideration in a test primarily interested in ascertaining "mutual economic

reliance." Yet the only comment about the Airport in this years long proceeding is the staff determination that the Airport need not be considered in *Tuck*'s economic analysis because "no resident of College Park lives at the airport." *Second Staff Order*, n. 4; App. 28a. It is courteous to call that reasoning irrational and neither the FCC nor the *Judgment* discuss the fact that the *Tuck* analysis the FCC employed did not impose a residency requirement upon any other business establishments which were studied. Moreover, nothing is said of WNNX's interrelationship admissions which WNNX itself characterized as substantial. The only evidence before the FCC was that the Airport's impact upon College Park was substantial, yet the FCC is silent about it and the *Judgment* fails to fault that silence. Mr. Small did not receive a "fair hearing" before the FCC because his voice was not heard.

F. The Mutually Exclusive Proposals Are Not "Similar"

The *Judgment*, at 2; App. 2a., erroneously states that Mr. Small's Social Circle proposal is "similar" to WNNX's proposal.[4] WNNX proposes to place its transmitter in the Central City of Atlanta, completely covering Atlanta with a city grade signal, and WNNX specified College Park, located in the Atlanta Urbanized Area, as the proposed city of license. Mr. Small did not propose to relocate to the Atlanta Urbanized Area and counsel cannot find anything in the FCC's orders or the record suggesting that Mr. Small's licensing proposal was "similar" to WNNX's. Given the record facts and allocation rules the FCC determined that the *Tuck* test applies to WNNX's proposal, but not to Mr. Small's proposal. The *FCC*

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[4] The *Judgment*, at 2 & n. *, App. 2a, states that "Small amended his petition by requesting a station in Covington, Georgia." Mr. Small's counterproposal specified Social Circle, Georgia to replace Covington which he had filed for initially. *First Staff Order*, ¶ 11; App. 16a. Counterproposals of this type are routine in allocation proceedings and the FCC found no problem with it.

Brief, No 04-1056/1057, at 31, discusses that Mr. Small would "likely prevail" if his view of the first local preference issue were correct. *See also Tuck*, 3 FCC Rcd. 5374, 5376 ¶ 21 (FCC 1988) (when an applicant is preferred under § 307(b) as a first local service, the Commission does not reach the standard comparative issue). The proposals are mutually exclusive, but not "similar," and the *Judgment*'s determination to the contrary is completely unsupported and clearly erroneous because a reviewing court may not supply rationale not found in the agency's orders. *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997) citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The *Judgment*, at 2; App. 2a., errs by characterizing Mr. Small's proposed license community as a "suburb" of Atlanta. There nothing in the FCC's orders or even the record supporting this finding and the point is debatable because Social Circle is approximately 35 air miles from Atlanta; College Park is adjacent to Atlanta; Atlanta owns more than half of College Park to operate the Airport; and College Park is located within the Atlanta Urbanized Area. In any event, WNNX correctly informed the appeals court that the FCC is not interested in whether a community is a "suburb" of another, *WNNX Brief*, No. 04-1056/1057, at 7-8; the FCC's concern is for "urbanized area" licensing proposals as defined by the U.S. Census. *Faye and Richard Tuck*, 3 FCC Rcd. 5374, 5377 ¶¶ 27-28 (FCC 1988). The determination that "College Park and Covington are both suburbs of Atlanta, Georgia," *Judgment*, at 2; App. 2a., focuses on the wrong community, is not supported by the *Orders on Review* or the record, and the purported "similarity" is legally irrelevant in any event.

G. Conclusion and Request for Relief

Mr. Small spent more than six years before the FCC requesting, *inter alia*, a rational explanation for the exclusion of the Atlanta Airport from the FCC's test of "mutual economic reliance" and a rational explanation why WNNX's earlier Atlanta relocation attempt is not relevant to determining

whether WNNX was engaging in prohibited allocation manipulation, but none was ever provided. Mr. Small was the first to file in the proceeding, but he understood that he would have to be procedurally precise because the opposition was represented by the former chief of the section which implements the type of rule change at issue in this case. No. 04-1056/1057 at JA0499. It turned out that Mr. Small was not permitted to misfile a single sheet of paper, *Third Order on Review*, n. 2; App. 37a,[5] while the FCC routinely gave WNNX substantial breaks by ignoring the Atlanta Airport, by ignoring WNNX's numerous interdependence admissions, by overlooking WNNX's *ex parte* violation, and by failing to investigate WNNX's involvement in procuring the intervention of U.S. Senators into the restricted proceeding where evidence indicated that inquiry would be appropriate.

Urbanized areas are not entitled to all of the radio stations and there are decades old tests employed to ensure that more remote areas receive radio service so that rural areas have a voice in the electronic media. However, those tests were not properly not applied in this case because the FCC was found to have "discretion" to ignore evidence in selecting a licensee. The *Judgment*, at 2; App. 2a., determines that the FCC awarded the license to WNNX because WNNX proposed to serve more people than Mr. Small. However, WNNX proposes to serve more people than Mr. Small precisely because WNNX proposes an Atlanta Urbanized Area station and Mr. Small does not. Because urbanized areas have large concentrations of people, and because such proposals would always prevail over more remote proposals on the standard population comparison, § 307(b) and the associated case law discussed above regulate Urbanized Area entry by limiting the availability of the

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[5] The paper had been filed with the FCC and served on the other parties in an earlier version of the reconsideration petition which led to the *Third Order on Review*.

dispositive first local preference. "That is the whole purpose of the *Huntington* doctrine – it keeps metropolitan areas from acting like black holes which draw in radio services which would lead to § 307(b) allocation concerns." *Petition for Rehearing En Banc*, No. 04-1056/1057, at 8, quoting No. 04-1056/1057 at JA0383.

The *Judgment* contains substantial errors of fact and law and an order vacating and remanding are appropriate to provide the appellate court with an opportunity to examine whether the "whole record" supports the FCC's licensing decision. *See e.g. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 668 (1994) (judgment vacated and case remanded "for further proceedings consistent with this opinion"); *FCC v. Allentown Broadcasting Corp*, 349 U.S. 358, 365 (1955) ("the proper disposition is to remand the case to the Court of Appeals for reconsideration of the record but freed from rulings declared erroneous in this opinion").

God save the United States and this Honorable Court.

Respectfully submitted,
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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

Nos. 04-1056 & 04-1057

Preston W. Small,

Appellant/Petitioner,

v.

Federal Communications Commission and The United States of America,

Appellees/Respondents.

WNNX Lico, Inc.,

Intervenor

On Appeal from and on Petition for Review of Orders of the Federal Communications Commission

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Filed On: May 19, 2005 [895382]

Before: EDWARDS, HENDERSON and TATEL, *Circuit Judges.*

JUDGMENT

These causes were heard on the record from the Federal Communications Commission and on the briefs and arguments by counsel. For the reasons set forth below, it is

ORDERED that the notice of appeal in No. 04-1056 and the petition for review in No. 04-1057 are denied.

Preston W. Small seeks review of several orders by the Federal Communications Commission (FCC or Commission) related to its decision to permit WNNX Lico, Inc. (WNNX) to substitute its Anniston, Alabama FM license for a radio channel based in College Park, Georgia and to deny Small's similar proposals to substitute his Milledgeville, Georgia FM channel license for one located in Covington, Georgia.* College Park and Covington are both suburbs of Atlanta, Georgia.

Small's and WNNX's proposals were mutually exclusive because of the proximity of College Park and Covington. *See* 47 C.F.R. § 73.207(b) (requiring minimum distance of 99 kilometers between adjacent Class C3 channels). In evaluating competing, mutually exclusive petitions, the FCC follows the allotment priorities established in *Revision of FM Assignment Policies and Procedures,* 90 F.C.C.2d 88 (1982) (*FM Priorities*). Under *FM Priorities,* the FCC accords first priority to a proposal that provides a community with "first full-time aural service." *Id.* at 91. Unable to grant both petitions, the FCC evaluated the proposals and deemed WNNX's superior to Small's because it served a larger community than Small's and provided first local service to College Park. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama and College Park, Covington, Milledgeville and Social Circle, Georgia),* 15 F.C.C.R. 9971, 9973 ¶ 12 (2000).

We uphold a final order of the FCC unless its decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a

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* In response to WNNX's College Park proposal, Small amended his petition by requesting a station in Covington, Georgia.

"deferential" standard of review. *Consumer Elecs. Ass'n v. FCC*, 358 U.S. App. D.C. 180, 347 F.3d 291, 300 (D.C. Cir. 2003). Small contends that the FCC acted in an arbitrary and capricious manner when it ruled that WNNX's proposal provided first local service to College Park. Small's claim fails. A suburban community's independence from a nearby Urbanized Area for the purpose of the first local service priority is evaluated based on eight factors outlined by the FCC in *Fave and Richard Tuck*, 3 F.C.C.R. 5374 (1988) (*Tuck*). The record more than adequately supports the Commission's decision. The FCC considered evidence regarding each *Tuck* factor and acted within its discretion in finding that College Park was sufficiently independent of Atlanta to merit first local service priority.

Small's remaining arguments are without merit. In view of our holding in No. 04-1056, we need not decide Small's outstanding motion regarding the filing of documents.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

No. 04-1056
Consolidated with 04-1057

Preston W. Small,

Appellant

v.

Federal Communications Commission,

Appellee

WNNX Lico, Inc.,

Intervenor

FILED ON: June 8, 2005

BEFORE: Edwards, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed May 25, 2005, it is

ORDERED that the petition is denied.

Per Curium

FOR THE COURT:
Mark J. Langer, Clerk

BY: **/s/ Michael C. McGrail**

Michael C. McGrail
Deputy Clerk

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

No. 04-1056
Consolidated with 04-1057

Preston W. Small,

Appellant

v.

Federal Communications Commission,

Appellee

WNNX Lico, Inc.,

Intervenor

Filed On: July 26, 2005 [908476]

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts, Brown* and Griffith, Circuit Judges

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* Circuit Judges Brown and Griffith did not participate in this matter.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

APPENDIX D

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations.
(Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia)

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 24, 2000
Released: April 28, 2000

By the Chief, Allocations Branch:

1. The Allocations Branch has before it the *Notice of Proposed Rule Making* in this proceeding, 13 FCC Rcd 12738 (1998). WNNX License Investment Company ("WNNX License"), Jefferson-Pilot Communications Company ("Jefferson-Pilot") and Cox Radio, Inc. ("Cox Radio"), filed Comments. Preston W. Small filed Comments and Counterproposal. WNNX License, Preston Small, Cox Radio, and Brantley Broadcast Associates filed Reply Comments. For the reasons discussed below, we are modifying the license of

Station WHMA, Channel 263C, Anniston, Alabama, to specify operation on Channel 263C3 at College Park, Georgia. We are also allotting Channel 264A to Ashland, Alabama, and Channel 261C3 to Anniston, Alabama.

Background

2. The Notice in this proceeding set forth two mutually exclusive Petitions for Rule Making. First, Preston Small, licensee of Station WLRR, Channel 264A, Milledgeville, Georgia, proposed the substitution of Channel 264C3 for Channel 264A, reallotment of Channel 264C3 to Covington, Georgia, as a second local service, and modification of his Station WLRR license to specify operation on Channel 264C3 at Covington. Second, WNNX License, licensee of Station WHMA, Channel 263C, Anniston, Alabama, proposed the substitution of Channel 263C3 for Channel 263C, reallotment of Channel 263C3 to College Park, Georgia, and modification of its Station WHMA license to specify operation on Channel 263C3 at College Park. In addition, WNNX License proposed the allotment of Channel 261C3 to Anniston, and Channel 264A to Ashland, Alabama, as new local services. In regard to its Petition for Rule Making, WNNX License also notes that its proposed reallotment of Channel 263C3 to College Park would eliminate an existing grandfathered 57.1-kilometer short-spacing between Station WHMA and Station WUSY, Channel 264C, Cleveland, Tennessee, and a 1.8-kilometer short-spacing between Station WHMA and Station WVNA-FM, Channel 262C1, Tuscumbia, Alabama. In response to the Notice, Preston Small filed a Counterproposal proposing the reallotment of Channel 264C3 to Social Circle, Georgia, instead of Covington as originally proposed in the Notice.

3. Cox Radio, Jefferson-Pilot and Preston Small filed Comments in opposition to the proposed WNNX License

channel reallotment from Anniston to College Park. All of these parties contend that College Park is not entitled to a preference as a first local service because it is located within the Atlanta Urbanized Area. In view of this fact and the fact that the proposed reallotment will result in a loss of service to approximately 600,000 persons currently being served by Station WHMA, these parties conclude that the public interest would be better served by retaining Channel 263C in Anniston.

4. In making a decision in this proceeding, it is first necessary to find that the proposed allotments at College Park, Ashland, and Anniston would result in a preferential arrangement of allotments as required by the Commission in *Modification of FM and TV Authorizations to Specify a New Community of License* ("*Community of License*"), 4 FCC Rcd 4870 (1989), *recon*, 5 FCC Rcd 7094 (1990). Upon a favorable determination, we must then compare this proposal against the competing Counterproposal for a new allotment at Social Circle, Georgia. We will discuss our resolution of both of these issues.

Discussion

5. After careful consideration of this matter, we are substituting Channel 263C3 for Channel 263C, reallotting Channel 263C3 to College Park, Georgia, and are modifying the license of Station WHMA to specify operation on Channel 263C3 at College Park. As requested, we are allotting Channel 261C3 to Annistion and Channel 264A to Ashland, Alabama, as a first local service. This will result in a preferential arrangement of allotments as required by *Community of License, supra*. In reaching this determination, we compared the existing versus the proposed arrangement of allotments using the FM priorities set forth in *Revision of FM Assignment*

Policies and Procedures, 90 FCC 2d 88 (1988).[1] In this instance, reallotting Channel 263C3 to College Park and allotting Channel 264A to Ashland would be preferred under Priority (3) as first local service to College Park. Anniston will continue to be served by four local stations. *See Marion and Orrville, Alabama*, 6 FCC Rcd 3482 (1991); *Bolivar and Nixa, Missouri*, 6 FCC Rcd 3648 (1991); *Fruitland and Weiser, Idaho*, 7 FCC Rcd 7538 (1992); *Moro, Bosque Farms and Socorro, New Mexico*, 8 FCC Rcd 791 (1993); *Ravenswood and Elizabeth, West Virginia*, 10 FCC Rcd 3181 (1995).

6. We also note that a Class C3 allotment at College Park would result in service to 2,133,614 persons in an area of 4,803 square kilometers. Inasmuch as College Park is located within the Atlanta Urbanized Area, this population and area already receive up to 28 aural services.[2] We recognize that even assuming activation of service by the Channel 261C3 replacement allotment at Anniston, 436,083 persons in an area of 11,280 square kilometers will lose the service from Station WHMA.[3] In this area, 17,424 persons will now receive four

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[1] The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

[2] The Commission considers five reception services to be "abundant" service. *See LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (1995); *see also Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd. 1983).

[3] In the event that there were no replacement services, 656,303 persons in an area of 18,117 square kilometers would lose service. In this area, 29,615 persons in an area of 2,300 square kilometers would receive four aural services, 20,013 persons in an area of 1,553 square kilometers would receive three aural services, 5,775 persons in an area of 559 square kilometers would receive two aural services, and 11 persons in an area of 2.67 square kilometers would receive one aural service.

fulltime aural services, 9,770 persons will now receive three fulltime services and 370 persons will now receive only two fulltime aural services. Even though we would not be creating any area receiving less than two aural services (referred to as "gray" area), we need to balance the public interest gains of the College Park proposal against the population that will receive less than five services which we consider to be abundant. At the outset, a new service at Ashland and, as discussed below, a first local service at College Park would be preferred under Priority 3 over the populations and areas that would receive less than abundant service which would be considered under Priority 4. In this regard, we note that Ashland itself currently receives fulltime service from only four stations. In addition to a net population gain of approximately 1,697,531 persons and the provision of two new locals services, we find the elimination of two existing short-spacings to be compelling factors weighing in favor of the proposed reallotment. Specifically, this will eliminate an existing 57.1-kilometer short-spacing to Station WUSY, Cleveland, Tennessee, and a 1.8-kilometer short-spacing to Station WVNA-FM, Tuscumbia, Alabama. The elimination of the 57.1-kilometer short-spacing with Station WUSY will also eliminate interference to Station WUSY reception to a population of 2,306 persons in an area of 115 square kilometers. *Cf. Point Pleasant and Red Bank, New Jersey*, 5 RR2d 1762 (1965).

7. In taking this action reallotting Channel 261C3 to College Park, we recognize that this will result in Station WHMA providing a 70 dBu signal to 45% of the Atlanta Urbanized Area. We are concerned with the potential migration of stations from lesser served rural areas to well-served urban areas. To this end, we will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallot its channel to a suburban community in or near an Urbanized Area. In making such a determination regarding a

proposal to award a first local service preference, we apply existing precedents. *See e.g. Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). In essence, we consider the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most importantly, the independence of the suburban community. [4]

8. In this situation, College Park, with a 1990 population of 20,457 persons, is entitled to a preference as a first local service. While this population total is only 5.2% of the population of Atlanta, we note that such a percentage has not precluded favorable consideration as a first local service. *See e.g. Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (1996); *Bay St. Louis and Poplarville, Mississippi*, 10 FCC Rcd 13144 (1995); *Scotland Neck and Pinetops, North Carolina*, 7 FCC Rcd 5113 (1992); and *D'Iberville and Wiggins, Mississippi*, 10 FCC Rcd 10796 (1995). Consistent with the factors set forth in *Faye and Richard Tuck, supra*, we conclude that College Park is not dependent upon the Urbanized Area for its existence.[5] College Park is a member

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[4] As stated earlier, College Park is located within the Atlanta Urbanized Area and Station WHMA will provide a 70 dBu signal to 45% of the Atlanta Urbanized Area. With respect to communities located outside the Urbanized Area, we require such a showing only in situations where the station will provide a 70 dBu signal to 50% or more of the Urbanized Area. *Headland, Alabama, and Chattahoocie, Florida*, 10 FCC Rcd 10352 (1995).

[5] In *Faye and Richard Tuck*, the Commission set forth eight factors in assessing the independence of a specified community: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media 77that covers the community's needs and interests; (3) whether community leaders and residents perceive the

of the Georgia Municipal Association and has an elected mayor, four elected city council members, and a city manager. The College Park city government, with 297 fulltime employees, includes a police department, a fire department, a department of public works, and a recreation department. In addition to its own local taxing authority, College Park has its own city judge and a code enforcement officer who enforces the city's zoning, building, electric, plumbing and other municipal codes. College Park operates its own electrical and water distribution systems, a sanitary sewer collection system, as well as municipal parks and recreation facilities including a municipal golf course. College Park has its own zip code and a local post office. Along with 802 licensed business establishments and its own health facility, College Park has its own religious and civic organizations. While College Park does not have its own local newspaper, local news and advertising is provided by The South Fulton Neighbor which specifically excludes Atlanta.

9. In its Comments, Cox Radio referred to the Commission decision in *RKO General, (KFRC), supra*, in which the Commission did not afford Richmond, California, a

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specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. We have considered a community as independent when a majority of these factors demonstrates that the community is distinct from the urbanized area. *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (1996); *Jupiter and Hobe Sound, Florida*, 12 FCC Rcd 3570 (1997).

preference as a first local service. Cox Radio contends that a decision in this proceeding awarding College Park a preference as a first local service would be inconsistent with the Commission decision in *RKO General (KFRC)*. We disagree. That proceeding involved a six-way comparative hearing for the facilities of AM Station KFRC, San Francisco, California. Two of the applicants specified Richmond, California, as their proposed community of license even though they had proposed facilities (unlimited time at a power of five kilowatts) and coverage identical to the facilities and coverage proposed by the other applicants who had proposed San Francisco as the community of license. In order to preclude an anomalous and artificial resolution of that proceeding, the Commission did not afford Richmond a dispositive comparative preference as a first local service.

10. Even though the communities of Richmond and College Park have similar characteristics regarding independence from an Urbanized Area, the situations are distinguishable. WNNX License is proposing a Class C3 allotment to serve College Park which provides a 70 dBu signal to 45% of the Atlanta Urbanized Area. In contrast, the applicants for Richmond proposed five kilowatts, sufficient to serve the entire San Francisco Urbanized Area, instead of a lesser AM power which would still have been adequate to serve Richmond. The primary distinction, however, between this proceeding and the Commission decision in *RKO General (KFRC)* is the fact that we will not permit our allotment priorities and policies to be used in a manner which might appear to condone an artificial and unwarranted manipulation of these priorities and policies. The Commission expressed this concern in *RKO General (KFRC)*, 5 FCC Rcd at 7096, and in *Community of License*, 5 FCC Rcd at 3223. Awarding a preference as a first local service to the Richmond applicants would have awarded an unfair and artificial advantage to these

applicants at the expense of the competing applicants who had proposed identical facilities for a San Francisco station. Unlike that proceeding, WNNX License did not propose an allotment to College Park which had been previously licensed to the larger community in the Urbanized Area. Instead, WNNX License merely proposed reallotting its existing channel from Anniston to College Park. As required by *Community of License*, it was then incumbent upon us to determine whether this would result in a preferential arrangement of allotments. It is our view that reallotting Channel 261C3 to College Park as a first local service, allotting Channel 264A to Ashland as a new local service, allotting replacement Channel 261C3 to Anniston, coupled with a net gain in service to 1,697,531 persons does, in fact, result in a preferential arrangement of allotments.[6]

Milledgeville and Social Circle, Georgia

11. As stated earlier, Preston Small filed a Counterproposal proposing the reallotment of Channel 264C3 to Social Circle, instead of Covington as originally proposed in the *Notice*. This would result in a first local service to Social Circle with a population of 2,753 persons. This will result in a service gain to 184,400 persons in an area of 4,773 square kilometers. This entire gain area already receives at least five aural services. On the other hand, removing Channel 264A from Milledgeville will result in 57,331 persons in an area of 2,486 square kilometers losing service. In regard to this loss area and population, we note that this will result in 115 persons in an area of 36 square kilometers receiving four aural services

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[6] The reference coordinates for Channel 263C3 at College Park, Georgia, are 33-45-32 and 84-30-10. The reference coordinates for Channel 264A at Ashland, Alabama, are 33-13-15 and 85-49-35. The reference coordinates for Channel 261C3 at Anniston, Alabama, are 33-40-51 and 85-48-56.

and 886 persons in an area of 34.9 square kilometers receiving only three aural services. Nevertheless, the proposed reallotment will result in Social Circle having its first local service and a net gain in service to 127,069 persons in an area of 2,287 square kilometers

12. At this juncture, it is necessary to compare the Preston Small proposal of a first local service to Social Circle against the WNNX License proposal for a first local service at College Park and a new local service at Ashland. Consistent with prior decisions, a first local service to the larger community of College Park, with a population of 20,457 persons, is preferred over a first local service at Social Circle, with a population of 2,753 persons. *See Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (1997); *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (1990). We also note that the WNNX License proposal provides an additional first local service to Ashland with a population of 2,034 persons. There are also additional public interest reasons to prefer the WNNX License proposal over the Preston Small proposal. First of all, the reallotment of Channel 261C3 to College Park and the allotment of Channel 264A to Ashland will result in a net service gain to 1,697,531 persons while the reallotment of Channel 264C3 to Social Circle would result in net service gain to 127,069 persons. Second, as stated earlier, the reallotment of Channel 261C3 will eliminate an existing grandfathered 57.1-kilometer short-spacing between Station WHMA and Station WUSY, Cleveland, Tennessee, and a 1.8-kilometer short-spacing between Station WHMA and Station WVNA-FM, Tuscumbia, Alabama.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective June 14, 2000, the FM Table of

Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below to read as follows:

Community	Channel No.
Anniston, Alabama	261C3
Ashland, Alabama	238A, 264A
College Park, Georgia	263C3

14. The window period for filing applications for Channel 261C3 at Anniston, Alabama, and Channel 264A at Ashland, Alabama, will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WNNX License Investment Company for Station WHMA, Anniston, Alabama, IS MODIFIED to specify operation on Channel 263C3 at College Park, Georgia, in lieu of Channel 263C at Anniston, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. Pursuant to Sections 1.1104(1)(k) and 1.1104(2)(k) of the Commission's Rules, any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change of community of license and/or upgrade. As a result of this proceeding, WNNX License Investment Company, licensee of Station WHMA, is required to submit a rulemaking fee in addition to the fee required for the application to effect the change in community of license.

17. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 418-2177

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX E

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations.
(Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia)

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

ERRATUM
Released: May 2, 2000

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1. Paragraph 15(b) of the Report and Order in the above proceeding (DA 00-322), released April 28, 2000, is hereby corrected to read as follows:

> "(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules; and"

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX F

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations.
(Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia)

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 7, 2001
Released: February 9, 2001

By the Chief, Allocations Branch:

1. The Allocations Branch has before it a Petition for Reconsideration filed by Preston Small directed to the *Report and Order* in this proceeding. 15 FCC Rcd 9971 (2000). WNNX License Investment Co. ("WNNX License") filed an Opposition to Petition for Reconsideration. Radio South, Inc. filed Comments on Petition for Reconsideration. Preston Small filed a Reply to Oppositions to Petition for Reconsideration.

For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. The *Notice of Proposed Rule Making* in this proceeding set forth two mutually exclusive Petitions for Rule Making. 13 FCC Rcd 12738 (1998). First, Preston Small, licensee of Station WLRR, Channel 264A, Milledgeville, Georgia, proposed the substitution of Channel 264C3 for Channel 264A, reallotment of Channel 264C3 to Covington, Georgia, as a second local service, and modification of the Station WLRR license to specify operation on Channel 264C3 at Covington. Subsequently, in response to the Notice, Preston Small filed a Counterproposal proposing the reallotment of Channel 264C3 to Social Circle, Georgia, instead of Covington as originally proposed. Second, WNNX License, licensee of Station WHMA, Channel 263C, Anniston, Alabama, proposed the substitution of Channel 263C3 for Channel 263C, reallotment of Channel 263C3 to College Park, Georgia, and modification of the Station WHMA license to specify operation on Channel 263C3 at College Park.

3. The *Report and Order* substituted Channel 263C3 for Channel 263C, reallotted Channel 263C3 to College park, and modified the Station WHMA license to specify operation on Channel 263C3 at College Park. In reaching this decision, we determined that the proposed Channel 263C3 allotment to College Park as a first local service would result in a preferential arrangement of allotments as required by *Modification of FM and TV Authorizations to Specify a New Community of License* ("*Community of License*"), 4 FCC Rcd

4870 (1989), *recon.* 5 FCC Rcd 7094 (1990).[1] Upon this determination, we then determined that first local service at College Park would be preferred over the Preston Small proposal for a first local service at Social Circle.

4. In his Petition for Reconsideration, Preston Small argues that the *Report and Order* "substantially fails" to discuss his arguments with respect to the independence of College Park from the Atlanta Urbanized Area and whether College Park is entitled to consideration as a first local service. In this regard, Preston Small notes that under *Faye and Richard Tuck*, 3 FCC RCd 5374 (1988), we examine such proposals by considering the signal population coverage, the size and proximity of the proposed community to the urban center, and the interdependence of the proposed community and the urban center utilizing the eight Tuck factors.[2] While Preston Small

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[1] In determining whether a proposal would result in a preferential arrangement of allotments, we compare the exiting versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and procedures*, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

[2] In *Faye and Richard Tuck*, the Commission set forth eight factors in assessing the independence of a specified community: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising

acknowledges that interdependence is the most important factor considered in making an allocation decision involving the proposed reallocation of a station to an urbanized area, Preston Smail contends that the *Report and Order* "mishandled" all three areas of inquiry.

5. We deny the Petition for Reconsideration. In doing so, we remain concerned with the potential migration of stations from lesser served rural areas to well-served urban areas and we will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallot its channel to a suburban community in or near an Urbanized Area. We will discuss each of the arguments in the Petition for Reconsideration under the guidelines set forth in *Faye and Richard Tuck*.

6. The first area of inquiry concerns the extent a station will provide service to the entire Urbanized Area. In this situation, we recognize that Station WHMA will provide a 70 dBu signal to 45% of the Atlanta Urbanized Area. This does not support a conclusion that College Park is not entitled to consideration as a first local service. As a Class C3 facility, Station WHMA will invariably serve a large area. In regard to the extent of coverage in this instance, we note that in analogous situations involving a community outside of an Urbanized Area, the Commission only requires a showing pursuant to *Faye and Richard Tuck* in proposals providing 50% coverage to an Urbanized Area. *Headland, Alabama and*

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market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. We have considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area. *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (1996); *Jupiter and Hobe Sound, Florida*, 12 FCC Rcd 3570 (1997).

Chattahoochee, Florida, 10 FCC Rcd 10352 (1995). In this connection, we note that we have approved reallotment proposals encompassing more than 45% of an Urbanized Area. *Oraibi and Leupp, Arizona*, 14 FCC Rcd 13547 (1999) (70 dBu over 90% of an Urbanized Area), and *Mullins and Briarcliffe Acres, South Carolina*, 14 FCC 10516 (1999) (70 dBu over 67% of an Urbanized Area). Our second area of inquiry involves the relative populations of College Park to Atlanta. The 1990 College Park population of 20,457 persons is substantial and supports a preference for College Park as a first local service. While this population is only 5.2% of the population of Atlanta, such a percentage has not precluded favorable consideration as a first local service. *See e.g. Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (1996); *Bay St. Louis and Poplarville, Mississippi*, 10 FCC Rcd 13144 (1995); *Scotland Neck and Pinetops, North Carolina*, 7 FCC Rcd 5113 (1992); and *D'Iberville and Wiggins, Mississippi*, 10 FCC Rcd 10796 (1995).[3] Our third, and most important, inquiry is the independence of the suburban community. In *Faye and Richard Tuck*, the Commission set forth eight factors in assessing the independence of a suburban community. The Preston Small Petition for Reconsideration discusses each of these factors. In order to address the

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[3] Preston Small has also cited our decision in *Parker and Port St. Joe, Florida*, 11 FCC Rcd 1095 (1996), in which we stated that a population percentage of 14.3% "runs counter to treating Parker as a distinct community." The decision in *Parker and Port St. Joe* does not preclude favorable consideration of College Park as a first local service for two reasons. First, the population of College Park (20,47 persons) is substantially larger than the population of Parker, Florida (4,598 persons). As indicated above, a substantial population evidences independence from a nearby Urbanized Area. Second, and notwithstanding the statement that a percentage of 14.3% runs counter to treating Parker as a distinct community, we did, in fact, determine that Parker was entitled to a preference as a first local service.

arguments contained in the Petition for Reconsideration, we will evaluate the College Park reallotment proposal using each of these factors.

7. The first factor is the work patterns of the College Park residents. Preston Small states that 84% of the College Park residents work outside of College Park and precludes a favorable finding on this factor. In rebuttal, the City of College Park has stated that 15% of its workforce work in either local, state and federal government jobs. In addition to the 802 businesses licensed to College Park, the City of College Park states that, between 1991 and 1998, it has created 2,000 new jobs in the service sector. This suggests that a significant number of persons reside and work in College Park and the percentage of residents working in College Park may be higher than the 16% alleged by Preston Small. Even if the 16% estimate is accepted, 16% of the College Park workforce is sufficient to support a favorable finding on this factor. *C.f. Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996). In regard to the second factor, whether the smaller community has its own newspaper or other media that covers the community's needs and interests, Preston Small contends that the *Report and Order* erred by referring to the South Fulton Neighbor newspaper as a local newspaper providing news and advertising for College Park. We continue to believe that the South Fulton Neighbor, which excludes Atlanta, national and international news, sufficiently covers the needs and interests of College Park to warrant a favorable determination with respect to second factor. While the South Fulton Neighbor covers other independent communities such as Hapeville, Stockbridge, Fairburn and East Point, it does provide an outlet for College Park by publishing College Park news, sports, advertising, public meetings and College Park legal notices. There is also a local cable access channel, a City of College Park web site and a newsletter published by the City of College Park

Recreation Department. We affirm our favorable finding on this factor. *C.f Elizabeth City, North Carolina and Chesapeake, Virginia*, 9 FCC RCd 3586 (1994); *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (1996).

8. The third factor, perception of community leaders and residents, and fourth factor, local government and elected officials, clearly support our determination concerning the independence of College Park. WNNX License has included a letter from the College Park mayor and city manager stating that College Park is a "community which stands entirely on our own, being completely self-supporting, and prides itself with providing quality municipal services to its citizens and businesses." WNNX License has also included similar letters from community and business leaders. *See Pleasanton, Bandera, Hondo and Schertz, Texas*, 15 FCC Rcd 3068 (2000); *Cadiz and Oak Grove, Kentucky*, 10 FCC Rcd 10785 (1995); *D'Iberville and Wiggins, Mississippi*, 10 FCC Rcd 10796 (1965). Factor 4, local government and elected officials, clearly supports a view that College Park is independent of Atlanta. The City of College Park has 325 fulltime employees as well as a Mayor, City Manager, City Attorney, City Clerk, City Engineer and City Auditor.

9. Similarly, factor 5, local telephone directory and zip code, and factor 6, commercial establishments, health facilities and transportation systems, support our conclusion regarding the independence of College Park. College Park has its own zip codes and local post office. In regard to factor 6, College Park has 802 licensed business establishments and its own health facility. Likewise, factor 7, the extent to which the specified community and the central city are part of the same

advertising market, favors a finding of independence.[4] There are two newspapers that local advertisers use to reach the residents of College Park, the Clayton News Daily and the South Fulton Neighbor. Neither of these newspapers serve Atlanta. Finally, factor 8, the extent the specified community relies upon the metropolitan area for municipal services, supports a finding of independence. College Park has its own police and fire departments, department of public works, operates its own electricity and water distribution systems, operates its own sewer system and provides park and recreation facilities including a municipal golf course. College Park also enforces its own zoning, building and plumbing codes.

10. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Preston Small IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

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[4] Preston Small notes that Hartsfield-Atlanta International Airport, owned by the City of Atlanta, is located, in part, within College Park. In addition to a welcoming sign from the mayor of Atlanta, the City of Atlanta provides water, sewer, electricity and gas to the Airport. According to Preston Small, this supports a contention that College Park is dependent upon Atlanta. We disagree. No resident of College Park lives at the Airport. Moreover, there is nothing in the record of this proceeding indicating that the City of Atlanta provides any municipal services to College Park

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX G

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations.
(Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia)

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 2, 2001
Released: November 2, 2001

By the Commission:

1. The Commission has before it a Petition for Reconsideration and Request for Protection filed by Preston Small directed to the staff *Memorandum Opinion and Order* in this proceeding. 16 FCC Rcd 3411 (2001). WNNX LICO, Inc. filed an Opposition to Petition for Reconsideration. Preston Small filed a Reply to Opposition to Petition for Reconsideration. We have thoroughly reviewed the staff *Memorandum Opinion and Order* as well as the earlier *Report*

and Order, 15 FCC Rcd 9971 (2000), and find that there are no errors of law or new facts that would warrant reversing the staff action. Accordingly, we deny the Petition for Reconsideration and Request for Protection.[1]

2. We would also like to address the reference by Preston Small to a decision in which the staff denied a proposal filed by the previous licensee of Station WHMA, Anniston, Alabama, to reallot Channel 263C1 from Anniston to Sandy Springs, Georgia, located within the Atlanta Urbanized Area. *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville*, Alabama, 6 FCC Rcd 6580 (1991), app. for review dismissed, 12 FCC Rcd 8392 (1997), *app. for review dismissed*, 13 FCC Rcd 2104 (1998). Even though that decision does not address the merits of the College Park reallotment proposal, also located within the Atlanta Urbanized Area, that action is distinguishable and does not support a finding that College Park is not entitled to allocation of a first local service. Specifically, the earlier Sandy Springs proposal would have resulted in interference to reception of FM radio service by 18,662 persons. Moreover, Sandy Springs was not incorporated, received all of its governmental services from either Atlanta or Fulton County, and many of the Sandy Springs civic organizations listed Atlanta addresses. In contrast, the *Memorandum Opinion and Order* in this case correctly

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[1] The "Request for Protection" concerns the fact that Preston Small filed an identical Petition for Reconsideration on March 12, 2001. The staff *Memorandum Opinion and Order* was published in the Federal Register on March 14, 2001. 66 Fed. Reg. 14862 (published March 14, 2001). In the event the earlier Petition for Reconsideration was deemed to be "somehow premature," Preston Small filed the instant Petition for Reconsideration and Request for Protection on March 30, 2001. In this Petition for Reconsideration and Request for Protection, Preston Small also states that if the staff considers this pleading to be repetitious, that it be referred to the Commission as an Application for Review. The Petition has been referred to the Commission and is being considered as an Application for Review.

concluded that the College Park proposal meets the criteria set forth in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998), with respect to suburban communities seeking allocation of a first local service. Furthermore, as stated in the staff *Report and Order*, 15 FCC Rcd 9971 (2000), the College Park proposal will result in the elimination of a 57.1-kilometer short-spacing to Station WUSY, Cleveland, Tennessee, and a 1.8-kilometer short-spacing to Station WVNA-FM, Tuscumbia, Alabama. The elimination of the short-spacing with Station WUSY will also eliminate interference to Station WUSY reception for 2,306 persons within an area of 115 square kilometers. The College Park proposal will result in no new interference.

3. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration and Request for Protection filed by Preston Small IS DENIED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau,(202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX H

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations.
(Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia)

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 1, 2002
Released: July 25, 2002

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1. The Commission has before it a Petition for Reconsideration and Motion to Reopen the Record filed by Preston Small ("Small") directed to the earlier Commission *Memorandum Opinion and Order* in this proceeding.[1] WNNX LICO, Inc. filed an Opposition to Petition for Reconsideration. Small filed a Reply to Opposition to Petition for

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[1] *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 16 FCC Rcd 19857 (2001).

Reconsideration. We have thoroughly reviewed our *MO&O* as well as the earlier staff *Memorandum Opinion and Order* in this proceeding,[2] and find that there are no errors of law or new facts that would warrant reconsideration of our prior order. Accordingly, we deny the Petition for Reconsideration and Motion to Reopen the Record.

2. We reject two procedural arguments raised on reconsideration. At the earlier stage of this proceeding, Small sought reconsideration of the original staff order in this docket. That petition for reconsideration was referred to the Commission pursuant to Section 1.106(a) of the Rules. Small argues that the Commission should have granted his request to supplement the record following this referral. Contrary to Small's wholly unsupported claim, the referral of a matter to the Commission pursuant to Section 1.106(a) does not create an opportunity for the filing of an additional pleading or "supplement." Neither our rules of practice nor other policies authorize such filings. We note that our Rules permit the Commission to act on any matter[3] and, as here, allow the staff to refer any matter to the Commission. Applicants and petitioners cannot claim surprise or unfairness when the Commission invokes these procedures. Moreover, we reject, as frivolous, Small's contention that the discussion of a ten-year old staff decision[4] constitutes "new facts" or "changed circumstances." Reconsideration is not available to reargue the

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[2] 16 FCC Rcd 3411 (M.M. Bur. 2001).

[3] *See* 47 C.F.R. § 0.5(c) (Commission may instruct the staff to refer any matter to it for action).

[4] *Eatonton and Sandy Springs, Georgia,and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580 (M.B. Bur. 1991) (subsequent history omitted).

relevance of this case.[5] Having failed to demonstrate new facts or changed circumstances, reconsideration is unwarranted.[6]

3. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration and Motion to Reopen the Record filed by Preston Small IS DENIED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[5] *See* 47 C.F.R. § 1.106(k)(3) (ruling denying reconsideration may not be treated as modification of original order and therefore such ruling is not subject to further reconsideration).

[6] *See* 47 C.F.R. § 1.106(b)(3) (petition for reconsideration which fails to rely on new facts or changed circumstances may be dismissed as repetitious).

APPENDIX I

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations.
(Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia)

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 8, 2004
Released: January 22, 2004

By the Commission:

1. The Commission has before it a Petition for Reconsideration and Second Motion to Reopen the Record filed by Preston Small ("Small") directed to the earlier Commission *Memorandum Opinion and Order* in this proceeding.[1] WNNX LICO, Inc. filed a Consolidated

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[1] *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 17 FCC Rcd 14830 (2002).

Opposition to Petition for Reconsideration.[2] Small filed a Reply to Consolidated Opposition to Petition for Reconsideration.[3] We have thoroughly reviewed our *Memorandum Opinion and Order* as well as our previous *Memorandum Opinion and Order* in this proceeding,[4] and find

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[2] Small has also filed four separate supplements to his Petition for Reconsideration and Second Motion for Leave to Reopen the Record. WNNX LICO, Inc. has filed an Opposition and Response. Each supplement was accompanied by a motion for leave to file the supplement. *See* 47 C.F.R. § 1.429(d). Consideration of these matters is unwarranted. An alleged *ex parte* violation and a threat of civil action are discussed below. We reject Small's untimely attempt to supplement the record with an "erroneously omitted" statement. *See* 47 C.F. R. § 1.429(b). Finally, a local court order not to enjoin Small from participating in this proceeding is simply irrelevant to the allocations actions taken in this docket.

[3] On October 29, 2003, Small filed a "Complaint and Request for Investigation" ("Small Complaint") in which he accuses counsel for WNNX LICO of soliciting, and in fact drafting, a letter sent to the Commission on October 8, 2003, by Senator Shelby of Alabama, concerning the delay in concluding the proceeding in MM Docket No. 98-112. Small Complaint at 2-6. Small also filed a Supplement on November 3, 2003. The Shelby letter was referred to the Commission's Office of General Counsel ("OGC), which sent an October 22, 2003, letter advising the Senator that his letter "cannot be considered" by the Commission because it was not served on the other parties to this proceeding. *Letter to The Honorable Richard Shelby* (OGC Oct. 22, 2003). Small nonetheless demands that we "investigate the role [WNNX LICO and its counsel] played in the effort to improperly influence the Commission's decision making process in the captioned case." Small Complaint at 10. Small's complaint is based entirely on speculation as to WNNX LICO's counsel's alleged involvement in soliciting and preparing Senator Shelby's letter. On November 6, 2003, WNNX LICO counsel filed a "Response" denying any contact with Senator Shelby's office or involvement in preparing the letter. Moreover, as noted the Shelby letter was not considered and, therefore, caused no harm. In these circumstances, we see no basis for further consideration of this matter.

[4] *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 16 FCC Rcd 19857 (2001).

that there are no new facts that would warrant reconsideration of any of our prior orders. Accordingly, we deny the Petition for Reconsideration and Second Motion to Reopen the Record.

2. Small raises two additional matters which do not require that we revisit either of our previous decisions in this proceeding. First, Small contends that WNNX LICO should be barred from further participation in this proceeding because it made a prohibited *ex parte* presentation in a separate proceeding regarding the Small Petition for Reconsideration in this proceeding. In this regard, we concur with the recent staff decision that no ex parte violation occurred.[5] In making that decision, the staff determined that WNNX LICO did not use the *Auburn* proceeding as a pretext to address the merits of this proceeding and that the presentation did not prejudice Small, who has a full opportunity to respond to those statements in the context of this proceeding. Second, Small contends that principals of the former licensee of Station WWWQ, Sapphire Broadcasting, Inc., "threatened" Small with civil action if he continued to pursue a remedy in this proceeding. In regard to WNNX LICO, Small refers to a 1997 Petition for Reconsideration of the grant of Small's application to sell Station WLRR, in which WNNX LICO referred to the sale as a violation of a contract between Small and Sapphire Broadcasting which would "trigger civil litigation." In addition to the fact that Sapphire Broadcasting is no longer the licensee of Station WWWQ and is not a party in this proceeding, the argument concerning WNNX LICO was not raised earlier and are therefore improper under Section 1.429(b) of the Rules.[6] In any event, Small has failed to establish any nexus between a

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[5] *Auburn, Alabama, et. al. ("Auburn")*, 18 FCC Rcd 10333 (MB 2003).

[6] 47 C.F.R. § 1.429(b). Although the Commission addresses the merits of Small's argument, it does not waive the procedural error.

single statement by WNNX LICO in a 1997 Petition for Reconsideration and the subsequent civil litigation by principals of Sapphire Broadcasting.

3. The Commission is not required to entertain redundant pleadings. As the Court has noted, "the Commission need [not] allow the administrative process to be obstructed or overwhelmed by copious or purely obstructive protests."[7] Moreover, our rules establish limits on a party's right to obtain review by the Commission on any particular matter.[8,9]

4. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration and Second Motion to Reopen the Record filed by Preston Small IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[7] *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994, 1005 (D.C. Cir. 1996).

[8] *See* 47 C.F.R. § 1.429(b) (limiting reconsideration of Commission actions to matters involving changed circumstances or facts unknown to petitioner and which could not, through the exercise of ordinary diligence, have been learned previously); *see also* 47 C.F.R. § 1.429(i) (permitting the staff to dismiss as repetitious a petition for reconsideration of a Commission action denying prior reconsideration petition).

[9] *See Martin-Trigona*, 592 F. Supp. 1566, 1568 (D. Conn 1984); *Nationwide Communications, Inc.*, 13 FCC Rcd 5654 (1998); *see also Public Notice, Commission Taking Tough Measures Against Frivolous Pleadings*, 11 FCC Rcd 3030 (1996).

STATUTES

PERTINENT STATUTORY PROVISIONS

5 U.S.C. § 701. Application; definitions

(a) This chapter [5 USCS § § 701 et seq.] applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

***

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1254 Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ***

47 U.S.C. § 154. Provisions Relating to the Commission
(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

47 U.S.C. § 155. Organization and Functioning of the Commission ***(c)(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5) and (6) of this subsection and except any action referred to in Sections 204(a)(2), 208(b) and 405(b) to a panel of Commissioners, an individual Commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in the Administrative Procedure Act), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8). Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this Act, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of Section 556(b) of title 5, United States Code, of any hearing to which such section applies.***

47 U.S.C. § 214

***(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such

certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.***

47 U.S.C. § 303

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall –***

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;***

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party;***

47 U.S.C. § 307 Licenses

*** (b) Allocation of facilities. In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same. ***

47 U.S.C. § 310

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

47 U.S.C. § 402 Proceedings to Enjoin, Set Aside, Annul or Suspend Orders of the Commission ***

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

(b) Right to appeal. Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of

authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act [47 USCS § 325] whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) hereof.***

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 1254 of Title 28 of the United States Code, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 C.F.R. § 1.1210 Prohibition on solicitation of presentations. - No person shall solicit or encourage others to make any improper presentation under the provisions of this section.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 05-284

IN THE
Supreme Court of the United States

Preston W. Small,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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November 8, 2005

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals lacked jurisdiction to review the entire record before the Federal Communications Commission in upholding the FCC's denial of Mr. Small's application in a 47 U.S.C. § 307(b) comparative licensing proceeding.

2. Whether the court of appeals erred by failing to review the FCC's exclusion of record facts and arguments from an analysis of "mutual economic reliance" including, *inter alia*, the Hartsfield Jackson Atlanta International Airport owned by the City of Atlanta, but located in College Park, GA.

3. Whether the court of appeals correctly entered findings of fact and conclusions of law which do not appear in the FCC's orders, or the record, in upholding the agency's decision.

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner, Preston W. Small, an individual.

2. Respondents, Federal Communications Commission and the United States of America.

3. Intervenor below: WNNX LICO, Inc., a subsidiary of Susquehanna Radio Corporation, which in turn is a subsidiary of Susquehanna Pfaltzgraph Co.

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V. OPINIONS AND ORDERS BELOW

1. *Judgment*, United States Court of Appeals for the District of Columbia Circuit, Nos. 04-1056 & 04-1057, May 19, 2005, unpublished, *Petition for Writ of Certiorari*, App. 1a; panel rehearing denied, June 8, 2005, *Petition for Writ of Certiorari*, App. 4a; rehearing en banc denied, July 26, 2005. *Petition for Writ of Certiorari*, App. 6a.

2. *Report and Order* (*First Staff Order*), 15 FCC Rcd. 9971 (Alloc. Br. 2000), DA 00-322, (65 FR 31498, May 18, 2000), *Erratum*, May 2, 2000. *Petition for Writ of Certiorari*, App. 8a.

3. *Memorandum Opinion and Order* (*Second Staff Order*), 16 FCC Rcd. 3411 (Alloc. Br. 2001), DA 01-333, (66 FR 14862, March 14, 2001). *Petition for Writ of Certiorari*, App. 21a.

4. *Memorandum Opinion and Order* (*First Order on Review*), 16 FCC Rcd. 19857, FCC 01-324, released November 8, 2001 (no *Federal Register* publication). *Petition for Writ of Certiorari*, App. 30a.

5. *Memorandum Opinion and Order* (*Second Order on Review*), 17 FCC Rcd. 14830, FCC 02-201, released July 25, 2002 (67 FR 55729, August 30, 2002). *Petition for Writ of Certiorari*, App. 33a.

6. *Memorandum Opinion and Order* (*Third Order on Review*), 19 FCC Rcd. 1603 (FCC 2004), FCC 04-1, released January 22, 2004, (69 FR 6582, February 11, 2004). *Petition for Writ of Certiorari*, App. 36a.

VI. JURISDICTIONAL STATEMENT

The FCC's jurisdiction to act is found at 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), 303(r), and 307(b). *First Staff Order*, ¶ 13; *Petition for Writ of Certiorari*, App. 17a.

Jurisdiction in the court of appeals pertained under 47 U.S.C. § 402(b) because the final rule making orders granted WNNX's license modification request and denied Mr. Small's license modification request. *See Judgment*, at 2; *Petition for*

Writ of Certiorari, App. 2a (holding is made in No. 04-1056 § 402(b) appeal). Mr. Small also sought review under 47 U.S.C. § 402(a) in No. 04-1057. Appellate jurisdiction also pertains under 5 U.S.C. § 702 which authorizes appellate review of final agency action.

The Court of Appeals, on its own motion, raised questions concerning the timing of Mr. Small's appeal to that court given Mr. Small's second reconsideration petition filed with the FCC Commissioners. Mr. Small generally responded that multiple reconsideration petitions are routinely filed at the FCC and that the appeals court routinely hears cases from the FCC involving multiple reconsideration petitions. Moreover, Mr. Small cited *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) for the proposition that the appellate filing clock restarts for an entire matter when a subsequent order "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered" amounting to more than textual correction. The *Second Order on Review* contained new substantive material compared to the *First Order on Review* thereby restarting the appellate filing period. The *Judgment* does not discuss this issue and does not fault Mr. Small's manner of exhausting remedies.

The United States Court of Appeals for the District of Columbia Circuit filed its *Judgment* in this case on May 19, 2005. Mr. Small timely filed petitions for rehearing and rehearing en banc, on May 26, 2005, and June 27, 2005, each date being within 45 days of May 19, 2005, as required by D.C. Circuit Rule 35(a), which petitions were denied on June 8, 2005, and July 26, 2005, respectively.

Subject matter jurisdiction arises in this Court under 5 U.S.C. § 702, 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j). Pursuant to Supreme Court Rules 13.1 and 13.3, and the Court's decision in *Hibbs v. Arizona Department of Revenue*, 124 S. Ct. 2276, 2283-84 (2004), Mr. Small's *Petition for Writ of Certiorari* was timely because it was filed within 90 days of the issuance of the July 26, 2005 *en banc* rehearing denial

order and, if relevant, within 90 days of the June 8, 2005, panel rehearing denial order. The instant rehearing petition is timely filed within 25 days of this Court's October 17, 2005, denial of Mr. Small's *Petition for Writ of Certiorari* as required by Rule 44.2.

Standing is established where 1) the FCC's denial of Mr. Small's license application 2) caused a denial of a Federal benefit to Mr. Small, a modified radio station license, and denied Mr. Small the opportunity to increase the value of his station by an estimated $20-$40 million, and 3) reversal of the FCC's denial orders would remedy the injuries. *See generally*, *Lujan v. Defenders of Wildlife*, 504 US 555, 560-61 (1992).

VII. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS CITED

5 U.S.C. §§ 702, 706, 706(2)(A); 28 U.S.C. § 1254(1); 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), 303(r), 307(b), 402(b).

VIII. JUSTIFICATION FOR REHEARING

The central substantive issue in this case is whether the FCC properly failed to consider evidence of economic interrelationship in determining the "mutual economic relationship" between two communities. *Faye and Richard Tuck*, 3 FCC Rcd. 5374, 5378 ¶ 37 (FCC 1988). The FCC's failure to discuss Mr. Small's economic interrelationship arguments was complete. The FCC failed to discuss: 1) that the FCC's application of the "mutual economic reliance" test examined mere community existence rather than economic interrelationship; 2) that a sliding scale is applied to the quantum of evidence needed to demonstrate community interrelationship based upon the close proximity of WNNX's proposed community of license to the Central City of Atlanta; 3) how "mutual economic reliance" evidence is weighed; 4) that a community's possession of various attributes, such as zoning/building/plumbing codes, elected officials, telephone directories, zip codes, municipal services, do not demonstrate a lack of "mutual economic reliance" on other levels; 5) the Central City of Atlanta's ownership and operation of the

world's largest passenger airport in WNNX's proposed community of license and utilizing more than 60% of the proposed community of license's land area to operate that airport; and 6) that WNNX agency pleadings highlight the "mutual economic reliance" which exists between the Central City of Atlanta and WNNX's proposed community of license.

These are very basic inquiries which go to the heart of the FCC's decision making process, yet the FCC does not say a word about them. Left unexplained, for example, is how the existence of elected officials is more probative of "mutual economic reliance" than is the joint operation of the world's largest passenger airport. The first does not even describe any level of interrelationship while the second contains so many levels of interrelationship, *inter alia*, taxes, employment, tourism, land use, environmental issues, utilities, transportation to and from the Airport, health and safety services, that the failure to address the point is irrational on its face.

After being unable to obtain a reasoned discussion from the FCC on these issues after more than five years of trying, Mr. Small sought relief in the Court of Appeals. Mr. Small argued that pursuant to 5 U.S.C. § 706 (2)(A) the Court of Appeals was to consider the "whole record" to determine whether the FCC's determination was rational and reasoned. However, the *Judgment* completely ignores Mr. Small's arguments noted above and determines that because portions of the agency record support the FCC's decision the FCC had "discretion" to award the license to WNNX over Mr. Small's objections. *Petition for Writ of Certiorari*, App. 3a. The FCC never asserted that it had "discretion" in this matter, in fact the FCC argued in the Court of Appeals that 5 U.S.C. § 706 (2)(A) applied thereby conceding any claim to discretion. *FCC Appeals Brief*, at 19. It is clear error for the Court of Appeals to uphold the FCC based upon a rationale not found in the agency's orders. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 721 (2001).

The icing on the cake is that the Court of Appeals wove facts and conclusions of law out of whole cloth by finding that Mr. Small's radio proposal is "similar" to WNNX's because both propose Atlanta "suburbs" as cities of license. *Petition for Writ of Certiorari*, App. 2a. Not only is this information not in any agency order, it is not even in the record. "A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and reach its own conclusions based on such an inquiry." *INS v. Fredy Orlando Ventura*, 537 U.S. 12, 16 (2002) (internal citation omitted). The Court of Appeals clearly erred by entering these findings. "Similar" proposals would perhaps necessitate reliance upon the agency's expertise. However, the FCC never found the proposals to be similar and the FCC expertise in making a close call is not required in this case and the Court of Appeals clearly erred by in making the finding.

IX. IMPORTANCE OF THE CASE

The D.C. Circuit is the only venue to which appeal of FCC licensing orders may be made, 47 U.S.C. § 402(b), and this case of sufficient national interest to warrant the Court's attention.[1] *INS v. Fredy Orlando Ventura*, 537 U.S. at 17 (discussing that incorrect and "potentially" far reaching circuit precedent required reversal; instantly, the *Judgment* sets a national standard given the D.C. Circuit's exclusive jurisdiction in FCC licensing matters). Mr. Small was entitled to fair treatment from the FCC, but he did not receive it because the FCC's orders completely ignore Mr. Small's "mutual economic relia[illegible]formation. The FCC's failure to address Mr. Small's ec[illegible]nic arguments after more than five years of litigation is unfo[illegible]nate, but not without recourse. Mr. Small thereafter was entitled to fair consideration by the Court of Appeals. However, the Court of Appeals uncharacteris-

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[1] The D.C. Circuit's unpublished *Judgment* is precedential. D.C. Cir. Rule 28(c)(1)(B).

tically failed to execute its oversight function and instead Mr. Small received a *Judgment* which fails to discuss a single one of his arguments and which commits clear error 1) by determining for the first time that the FCC has "discretion," to ignore evidence when selecting a licensee and all this without a word of explanation regarding the source of the purported "discretion;" 2) by employing that court's own *post hoc* rationalizations, unsupported by the FCC's orders or even the record, in upholding the agency's unreasoned decision; and 3) by creating the "facts" that Mr. Small's and WNNX's proposed communities are "suburbs" of Atlanta and that the proposals are "similar."

Mr. Small is entitled to have substantial arguments considered in a meaningful manner and not have them summarily dismissed via agency and judicial muteness or via judge made rationalizations. The Court of Appeals did not ask a single question at oral argument regarding purported agency discretion or the purported similarity of the competing proposals, topics which are not discussed in the FCC's orders nor its brief before the Court of Appeals. The rationalizations used to deny Mr. Small's request for relief spring from left field and fail to address either the evidence raised by Mr. Small nor Mr. Small's arguments concerning the FCC's misapplication of the "mutual economic reliance" test.

In *Eberhart v. United States*, No. 04-9949, Slip Op. at 8, decided October 31, 2005 (*per curiam*), the Court reversed an appeals court, but determined that the appeals court "neither forced the issue by upsetting what the Court of Appeals took to be our settled precedents, nor buried the issue by proceeding in a summary fashion. By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review." Instantly, the Court of Appeals ignored, without discussion, *Chenery's* limiting of review to rationale supplied by the agency despite being squarely presented with the requirement. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (agency may be upheld only upon rationale found in its

orders); *Small Brief*, No. 04-1056, at 20; *Small Petition for Rehearing En Banc*, No. 04-1056, at 2, 8. Moreover, the Court of Appeals ignored, without discussion, substantial economic evidence relating to the Atlanta Airport despite the requirement of 5 U.S.C. § 706 to review the "whole record" and not just those portions which support the agency's determination. *Small Brief*, No. 04-1056, at 20-21; *Small Petition for Rehearing*, No. 04-1056, at 4; *Small Petition for Rehearing En Banc*, No. 04-1056, at 6-7. Furthermore, the Court of Appeals ignored, without discussion, the fact that matters committed to agency "discretion" are extremely limited and that agency discretion is not applicable to comparative licensee selection at the FCC. *Small Petition for Rehearing*, No. 04-1056, at 2, citing *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Small Petition for Rehearing En Banc*, No. 04-1056, at 6-7, citing *Lincoln* and *Citizens to Preserve Overton Park*. The Court of Appeals clearly erred and reversal is required. *See INS v. Fredy Orlando Ventura*, 537 U.S. at 17 (reversal upon clear error).

The Court of Appeals not only forces legal issues by ignoring clear appellate review requirements, it buried Mr. Small's arguments by failing to address a single one of them. Mr. Small plainly made the necessary arguments and presented substantial economic evidence and "mutual economic reliance" test application information to the FCC and to the Court of Appeals; that information is not rendered inutile merely because the FCC and the Court of Appeals fail address it. *Dye V. Hoffbauer*, No. 04-8384, Slip Op. at 2-3, decided October 11, 2005 (*per curiam*) ("It is too obvious to merit extended discussion that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court. . .") (internal quote omitted).

X. CONCLUSION

The Chief Justice testified during his recent confirmation hearing that a judge's institutional function "is to interpret the law, not to make the law. And that applies without regard to what law you'd like to have made or not." Testimony of John G. Roberts, Senate Judiciary Committee, September 14, 2005. However, the judges in this case not only made up law regarding a purported agency "discretion" by which they ignored evidence, they made up their own set of facts to uphold the agency. "The role of an umpire and a judge is critical. They make sure everybody plays by the rules." Opening Statement of John G. Roberts, Senate Judiciary Committee, September 12, 2005. The rules were not followed in the instant case. Incorrect exposition of the law is one thing, but upholding and agency decision on rationale not provided in the agency's orders is not permitted and fact creation by a Federal appellate court to uphold a governmental action is inimical to property and liberty interests.

The Chief Justice testified at his recent confirmation hearing that "if the Constitution says that the little guy should win, the little guy's going to win in court before me. But if the Constitution says that the big guy should win, well, then the big guy's going to win, because my obligation is to the Constitution." Testimony of John G. Roberts, Senate Judiciary Committee, September 15, 2005. Surely all would agree that the "little guy" prevails not only if the Constitution requires it, but also if statutes and/or federal regulations require it. However, this case has been handled as if operating under a caste system where Mr. Small, surely the little guy in this case, did not even receive reasoned issue discussion much less prevail on the merits.

From top to bottom this case exemplifies the epitome of administrative dysfunction. After more than seven years of litigating not a single word has been uttered by either the FCC or the Court of Appeals which explains how one properly excludes from a study of "mutual economic reliance" the fact

that Atlanta owns and operates the world's largest passenger airport located inside WNNX's proposed city of license. The reader has been to the Airport and knows what it is. This is not *1984* and the very large, economically and socially critical Atlanta Hartsfield Jackson International Airport exists and has an enormous effect upon the lives who live near it even if, to date, not a single Federal decision maker has entertained those facts.

WHEREFORE, it is respectfully requested that the case be remanded to the Court of Appeals with instructions to examine the "whole record" including, *inter alia*, the FCC's years long failure to address Mr. Small's "mutual economic reliance" information and to exclude judicially made findings of fact and rationalizations.

God save the United States and this Honorable Court.

Respectfully submitted,
PRESTON W. SMALL

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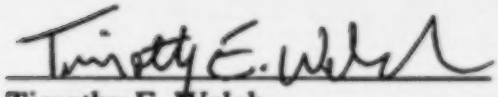
CERTIFICATION OF COUNSEL
No. 05-284

Pursuant to Supreme Court Rule 44.2 undersigned counsel hereby certifies that the instant *Petition for Rehearing* contains discussion of substantial and controlling grounds not previously presented to the Court and that the *Petition for Rehearing* is presented in good faith and not for delay.



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